SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX, COMMONWEALTH OF MASSACHUSETTS

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[fol. 1]

IN SUPERIOR COURT OF MIDDLESEX COUNTY

Criminal. No. 5891

COMMONWEALTH

vs.

HERMAN SNYDER and JOHN A. DONNELLON

Summary of the Record

On the sixth day of April, 1932, the Grand Jury for the County of Middlesex returned the following

INDICTMENT

COMMONWEALTH OF MASSACHUSETTS.
Middlesex, To wit:

At the Superior Court begun and holden at the city of Cambridge, within and for the County of Middlesex, for the transaction of criminal business, on the first Monday of April, in the year of our Lord one thousand nine hundred and thirty-two.

The Jurors for the Commonwealth of Massachusetts on their oath present, that James T. Garrick, Herman Snyder and John A. Donnellon on the ninth day of April in the year of our Lord one thousand nine hundred and thirty-one at Somerville in the County of Middlesex aforesaid, did as-
[fol. 2] sault and beat one James M. Kiley with intent to kill and murder him, and by such assault and beating did kill and murder said James M. Kiley.

Against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

A true bill.

Frank G. Volpe, Assistant District Attorney.
Harold R. Acres, Foreman of the Grand Jury.

Arraignment and Plea

And it appearing to the Court that the said indictment charged the said defendant Snyder with a crime punishable with death, it was ordered by the Court that said Herman Snyder be held in the custody of the Sheriff of said County of Middlesex to answer to said indictment, and that he be notified that said indictment as to him would be entered forthwith upon the docket of said court by causing him to be served with an attested copy of said indictment and of the orders of the court thereon, as soon as conveniently might be. In obedience to said orders, said defendant was notified as thereby required; said indictment was entered of record upon the docket of said court, and notice thereof, together with a copy of said indictment, was sent to the Chief Justice of said Superior Court and to the Attorney General for said Commonwealth.

On the sixth day of April, 1932, the defendant Snyder was arraigned and had the indictment read to him to which he pleaded that he was not guilty, and for trial thereof put himself upon the country. On the twelfth day of said April, the court appointed A. C. Webber, Esquire, counsel for the defendant Snyder.

Subsequently, it appearing to the court that the said indictment charged the said Donnellon with a crime punishable with death, it was ordered by the court that the said John A. Donnellon be held in the custody of the Sheriff of [fol. 3] said County of Middlesex, to answer to said indictment and that he be notified that said indictment as to him would be entered forthwith upon the docket of said court by causing him to be served with an attested copy of said indictment and of the orders of the court thereon, as soon as conveniently might be. In obedience to said orders, said defendant was notified as thereby required; said indictment was entered of record upon the docket of said court as to said Donnellon, and notice thereof, together with a copy of said indictment, was sent to the Chief Justice of said Superior Court and to the Attorney General for said Commonwealth.

On the second day of May, 1932, the said Donnellon was arraigned and had the indictment read to him to which he

pleaded that he was not guilty, and for trial thereof put himself upon the country, and on the same day, the court appointed William H. McDonnell, Esquire, counsel for him.

On the thirteenth day of May, 1932, a report of investigation into the mental condition of the defendant Herman Snyder was filed in the case, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

REPORT OF INVESTIGATION INTO THE MENTAL CONDITION OF HERMAN SNYDER

Chapter 105, Acts of 1929

The Commonwealth of Massachusetts, Department of Mental Diseases

May 13, 1932.

To the Clerk of the Superior Court for the County of Middlesex:

As provided by Chapter 105, Acts of 1929, this Department has been notified that Herman Snyder is held for trial in the above-named court charged with the crime of murder. I have caused an examination of said Herman Snyder to be made "to determine his mental condition and the existence [fol. 4] of any mental disease or defect which would affect his criminal responsibility."

The said Herman Snyder was examined on April 7, 12, 22 and May 3, 1932 by Drs. Ball and Barrett.

The report of the examination is transmitted herewith.

Respectfully yours, Winfred Overholser, Assistant Commissioner.

Report to Department of Mental Diseases

(On Mental Examination of Prisoner under Chapter 105, Acts of 1929)

Name: Herman Snyder.

Examined at Middlesex Co. Jail Apr. 7-12-22, and May 3, 1932.

Indicted or bound over for trial for the crime of Murder.

1. Age, 21. Religion, Jewish. Color, White.

2. Occupation, Printer.

3. Single; married; widowed; divorced; separated: Single.

4. Birthplace, Boston, Mass.

5. Residence, 90A West Cedar Street.
(a) How long there, 2 yrs.
(b) How long in Massachusetts, Life.
(c) How long in United States, Life.

6. Nearest relative (State relationship), Mother. Name and address, Sadie Snyder, Same address.

7. Attorney, A. C. Webber.

8. History of physical and mental condition: So far as can be ascertained prisoner was born normally and walked and talked as the other children of the family, but is described by the mother as being a nervous child, easily stirred up and excitable and having a violent temper. She tells that when he was 4 or 5 yrs. old he had several fainting spells during which he was unconscious but as he grew older [fol. 5] these stopped but he was still subject to extreme spells of temper and that following these he would have to be put to bed. Prisoner denies that he ever had convulsions but has fainted several times when he was undergoing physical examination, and he fainted when this examiner did a physical examination on him at the jail. He had influenza in 1918—Tonsillectomy about 10 yrs ago—Gonorrhea 2 yrs. ago followed by epididimytis. Has never been considered an exceptionally strong person physically.

9. Education: Is said to have entered school at about 7 yrs. and graduated from 9th grade at 16—and was an average pupil—Teachers are said to have found him easy to deal with, alert and keen. He left school at 16 before completing prevocational training.

10. Employment:
(a) History of employment: Following graduation he has worked at odd jobs—such as orderly at Mass. Gen. Hosp., Bay State Fish Co., O'Hara Fish Co., Carver N. E. Press—Grays Tire Shop—Waterman's Greater shows—Chauffeur etc. Never stayed long at any job.

(b) Earning capacity: Will probably average $12 to $15 per week.

11. Habits:
(a) Alcohol: Uses some—gets drunk occasionally.
(b) Drugs: None.
(c) Sex: Heterosexual—Gonorrhea 2 yrs. ago.

12. Previous arrests, convictions and sentences 1926: Receiving stolen property—Probation. 1931—Carrying a sling shot—suspended sentence.

13. Social adaptability and interest in social life: Prisoner is described as being an irritable person—not caring for home—preferring to be on the streets and he states that he enjoys gang life and that he likes to be with persons who "live like real guys".

[fol. 6] 14. Psychiatric findings. This prisoner has been interviewed on 5 different occasions. At the time of the first interview he talked freely—was correctly oriented—stated he had been apprehended in Philadelphia where he had been for almost a year except for one or two trips on vessels to the south coast of the U. S. He was well informed about how he was apprehended and seemed to have enjoyed the trip back by air plane. He did not seem concerned about his present predicament and stated that he was not worried about it. No delusions could be developed and false perceptions of any kind could not be elicited. During subsequent interviews he has not been so co-operative but would talk some. During the 2nd interview he did submit to a superficial physical examination but fainted during stethoscopic examination of the chest and since then has refused further physical examination. For the most part he has been rather defiant, flippant and evasive. On Apr. 9 Samuel J. Beck, Psychologist at the Boston Phychopathic Hospital attempted to do an intelligence test but he was not co-operative and test was not satisfactory. From history developed from mother and others, this prisoner has had since he was 4 or 5 years old, some sort of seizures during which he would become unconscious, froth at the mouth and bite his tongue. At times he has wet his clothing during these. We can not develop any history of recent seizures of this sort—the last being observed when he was about 17 yrs. old. But he has been

given to periods of violent temper during which he would throw things at others. We have not been able to observe any such seizures but the description strongly suggests that they may be epileptic in nature. We do not consider that he is normal but do not find that he is now insane.

15. State definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease [fol. 7] or defect which would affect his criminal responsibility: In our opinion the prisoner is possibly an epileptic and not normal but we do not consider him insane. He appears to be of average intelligence.

Family History: Father—Jacob Snyder—born in Russia 1880—Came to U. S. 1907—Barber by trade. Committed as insane 1922—Died 1926. Paternal uncle—Abraham Snyder committed as insane 1925. Mother—Sadie Mussman—born in Poland 1881—Living. Prisoner is the 3rd of 7 children and there is no definite evidence of mental disease in any although several have been considered behavior problems.

J. E. Barrett, M. D. Arthur N. Ball, M. D.

On the same day, a report of investigation into the mental condition of the defendant James A. Donnellon was filed, and is as follows:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

REPORT OF INVESTIGATION INTO THE MENTAL CONDITION OF JAMES A. DONNELLON

Chapter 105, Acts of 1929

The Commonwealth of Massachusetts, Department of Mental Diseases

May 13, 1932.

To the Clerk of the Superior Court for the County of Middlesex:

As provided by Chapter 105, Acts of 1929, this Department has been notified that John A. Donnellan is held for trial in the above-named court charged with the crime of murder.

I have caused an examination of said John A. Donnellan to be made "to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility."

[fol. 8] The said John A. Donnellan was examined on May 3, 1932 by Drs. Barrett and Ball.

The report of the examination is transmitted herewith.

Respectfully yours, Winfred Overholser, Assistant Commissioner.

Report to Department of Mental Diseases

(On Mental Examination of Prisoner under Chapter 105, Acts of 1929)

Name: John A. Donnellan.
Examined at Middlesex Co. Jail May 3, 1932.
Indicted or bound over for trial for the crime of Murder.

1. Age, 23; Religion, Roman Catholic; Color, White.

2. Occupation, Marine fireman.

3. Single; married; widowed; divorced; separated: Single.

4. Birthplace, Boston, Mass.

5. Residence, Los Angeles, Cal.
(a) How long there? 1 year.
(b) How long in Massachusetts? Life up to 1 year ago.
(c) How long in United States? Life.

6. Nearest relative (State relationship), Sister. Name and address, Mollie Donnellan, Boston (street not known).

7. Attorney, Wm. McDonald.

8. History of physical and mental condition: In Boston City Hospital five days summer of 1930 for treatment of head injury (laceration of forehead and concussion). Good recovery except for occasional neuralgic pains in forehead. Gonorrhea "about a year and a half ago". Good recovery. Denies knowledge of other illnesses.

9. Education: Completed 8th grade public school at 14. Never repeated grades.

[fol. 9] 10. Employment:

(a) History of employment: Went to sea as fireman after leaving school. Has followed the sea most of his life since although working occasionally as chauffeur and truck driver.

(b) Earning capacity $75 per month and found as marine fireman.

11. Habits:

(a) Alcohol, Periodically intemperate:

(b) Drugs, Denied.

(c) Sex, Normally heterosexual.

12. Previous arrests, convictions and sentences "Six or seven" arrests for drunk. Fined. Two arrests for Misapp. of auto—Probation and 30 Days Deer Island 1930. One arrest for Larceny of auto tires—Served 11 mos. Shirley 1925.

13. Social adaptability and interest in social life: Chooses male associates usually. Takes part in amateur athletics. Reads considerable light fiction as well as newspapers.

14. Psychiatric findings: Prisoner is correctly oriented—willing to co-operate during the examination. No delusions nor hallucinations could be elicited but prisoner is somewhat depressed and anxious about this present situation, although not abnormally so. He is of normal intelligence and a psychometric examination gives him a mental age of 163 with an I. Q. of 102.

15. State definitely whether, in the opinion of the examiner, the prisoner is suffering from any mental disease or defect which would affect his criminal responsibility: In our opinion the prisoner has no mental disease or defect.

Social Investigation: Prisoner born in Boston July 20, 1908, one of 9 children. He is a twin, brother having died at birth. Parents Irish. Early life spent in congested Back Bay district, much of his time being spent on the streets and in freight yards and city lots. Father is reported to have been a periodical drinker and this made [fol. 10] home life very disagreeable, but prisoner is said to have been very fond of his father. Father eventually left home and the family is said to have done better fol-

lowing this. The mother died in 1923 when prisoner was 15 yrs. old and an older sister, Mary, undertook to carry on the household. Prisoner entered school at age of 5 yrs. and graduated from Myles Standish Prevocational School in 1923. He was never very industrious about getting work, and is said to have spent much of his time with a gang which did not work, and he has made at least two trips across the continent in a desultory search of employment. Has done such work as marine fireman, work in wheat fields of So. Dakota, truck driver, usher in theatres, roustabout with Ringling's Circuit. Since 1921 he has been in conflict with the police and in 1925 was sent to Shirley—a total of 22 arrests have been found—a number of these have been for drunkenness. There is no history of mental disease in the family so far as could be developed.

J. E. Barrett, M. D. Arthur N. Ball, M. D.

On the sixteenth day of May, 1932, it was ordered by the court that this case is subject to General Laws, Chapter 278, as amended by Acts of 1925, Chapter 279, and Acts of 1926, Chapter 329.

On said sixteenth day of May, the defendant Snyder filed the following motion for a bill of particulars, which motion was allowed by the court:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

MOTION OF DEFENDANT HERMAN SNYDER FOR BILL OF PARTICULARS

The defendant, Snyder, says that the offence charged against him and by said indictment is not fully, plainly, substantially and formally set out therein, and that in order to prepare for his defence, he desires information as to [fol. 11] time, place and means and requests the Court order the Commonwealth to file a Bill of Particulars specifying:

1. As to time: The exact date and exact time of the day when said crime was committed.

2. As to place: The exact location of the building, if there was a building, and the place on the premises where said murder was committed.

3. As to means: The manner, how, and by what acts and means the offence charged was committed, including an exact description of any weapon claimed to have been used by any defendant in the commission of the crime alleged in the indictment.

4. To specify which particular defendant in fact did actually assault and beat the said James M. Kiley.

5. As to the crime itself: The Commonwealth is asked to specify whether the offence alleged was—

(a) Murder committed with deliberately premeditated malice aforethought.

(b) Murder committed with extreme atrocity or cruelty.

(c) Murder committed in the commission of a crime punishable with death or imprisonment for life.

(d) Murder committed in the attempted commission of a crime punishable with death or imprisonment for life.

(e) If it is claimed that the murder consisted of murder committed in the commission of a crime, the Commonwealth shall specify what the crime was and by reference to any statute defining said crime.

(f) If it is claimed that the murder was committed in the attempted commission of a crime, the Commonwealth shall specify which crime is referred to, what the attempts consisted of, and what acts of this defendant constituted said attempt.

By His Attorney, A. C. Webber.

[fol. 12] And on the same day, the Attorney for said Commonwealth filed the following, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ANSWERS TO DEFENDANT'S MOTION FOR SPECIFICATIONS

Now comes the Commonwealth and in answer to motion for bill of particulars of defendant Herman Snyder, and specifies as follows:

1. April 9, 1931, in Somerville, Massachusetts, between the hours of 7:15 and 8 P. M.

2. In a building located and occupied by the Cities Service Refining Company as a gasoline station at number 13 Somerville Avenue, Somerville, Massachusetts.

3. Deceased was murdered as a result of a bullet fired from a thirty-two calibre Colt Automatic pistol, the bullet going through his heart and coming out of his back.

4. The defendant, Herman Snyder, fired the shot from said pistol that killed James M. Kiley.

5. The Commonwealth specifies that this murder was committed with deliberately premeditated malice aforethought, and also murder committed in the attempted commission of a crime punishable by imprisonment for life, to wit: robbery while armed, as defined in Chapter 265, Section 17 of the General Laws.

6. And the Commonwealth further says that the defendant, Herman Snyder, entered said gasoline station and while armed attempted to rob the deceased, and shot and killed the deceased with a thirty-two Automatic Colt pistol.

For the Commonwealth, F. G. Volpe, First Ass't District Attorney.

On the seventeenth day of said May, 1932, the defendant Snyder filed the following motion:

[fol. 13] In Superior Court of Middlesex County

Motion of Defendant Snyder to Attend View

The defendant Snyder requests permission to be present at the view, and that is necessary to acquaint his Counsel with facts necessary to his defence; that the Dist. Atty. has had a co-defendant at the scene of the alleged murder and has secured information thereby, presumably against this defendant.

That to deny the request of this defendant is to deprive him of rights guaranteed him under the Constitution of the United States and amendments thereto and particularly Art. VI thereof and the Constitution of Massachusetts, and the Declaration of Rights, and particularly Art. 12 thereof.

By His Attorney, A. C. Webber.

This motion was denied by the Court.

Subsequently a jury was empanelled for the trial of the indictment as to the defendants Snyder and Donnellon, and on the twenty-fourth day of May, 1932, the defendant Snyder filed the following:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

MOTION OF DEFENDANT SNYDER FOR DIRECTED VERDICT

And now comes this defendant and severally moves, that upon all the Evidence, that the Court direct the jury

1. To find a verdict of not guilty as against defendant Snyder.

2. That a verdict of murder in the first degree cannot be found as against said Snyder.

By His Attorney, A. C. Webber.

And said motion was denied by the court.

IN SUPERIOR COURT OF MIDDLESEX COUNTY

VERDICT

On the twenty-fourth day of May, 1932, the jury, after hearing all matters and things concerning the said indict-
[fol. 14] ment, returned their verdict therein and upon their oath said that said Herman Snyder and John A. Donnellon are severally guilty of murder in the first degree.

On the seventh day of June, 1932, the defendant Herman Snyder filed a claim of appeal, viz:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

CLAIM OF APPEAL

Now comes the defendant, Herman Snyder, in the above entitled cause and claims an appeal from certain opinions, orders, rulings, directions, instructions, and judgments made by the presiding Justice during the course of the trial of said cause, and every way in which questions of law were reserved for review, the details of said appeal to be more specifically set forth in defendant's Assignment of Errors, to be hereinafter filed.

Herman Snyder, By His Attorney, A. C. Webber.

On the tenth day of said June, the defendant John A. Donnellon filed the following

IN SUPERIOR COURT OF MIDDLESEX COUNTY

CLAIM OF APPEAL

And now comes the defendant, John A. Donnellon, in the above entitled cause and claims an appeal from certain opinions, orders, rulings, directions, instructions, and judgments made by the presiding Justice during the course of the trial of said cause, and every way in which questions of law were reserved for review, the details of said appeal to be more specifically set forth in the defendant's assignment of errors, to be hereinafter filed.

John A. Donnellon, by William H. McDonnell, His Attorney.

[fol. 15] On the twentieth day of June, 1932, a copy of the Transcript of the Evidence was delivered to the Clerk of Courts.

On the nineteenth day of September, 1932, a written notice of the completion of the Summary of the Record was given to counsel for defendants Snyder and Donnellon.

On the twenty-eighth day of September, 1932, the defendant Snyder filed the following:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ASSIGNMENT OF ERRORS OF THE DEFENDANT SNYDER

Now comes this defendant and files the following assignment of errors. Reference is made to the exceptions as numbered in the Transcript of the Evidence, and to the pages therein for the convenience of the Court, but such references are not to exclude other parts of the Transcript, nor are the grounds stated to exclude other grounds that are suggested by the claim, and required to fairly raise all questions of law.

1. This defendant assigns as error, the order and ruling requiring the trial to proceed without the defendant Garrick, who was jointly indicted with this defendant, because it violated a positive right of this defendant to be tried as

the grand jury directed by their indictment, and tended to convey to the jury the belief that the Government regarded Garrick less culpable than this defendant, to his prejudice.

(Exceptions 1 and 2. Transcript, pages 4-12.)

2. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Claude E. Furze, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.

(Exceptions 3 and 4. Transcript, pages 17-20.)

3. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Edward B. Gel- [fol. 16] dert, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.

(Exceptions numbers 5, 6, and 7. Transcript, pages 21-25.)

4. This defendant assigns as error, the ruling and direction requiring the clerk to read the Commonwealth's Specifications to the jury after objection made to this procedure by this defendant, because the office of said specifications was merely to inform the defendant of certain facts to enable him to present his defense, and the reading of said specifications tended to the prejudice of this defendant before the jury.

(Exception number 8. Transcript, pages 31-33.)

5. This defendant assigns as error, all proceedings that occurred in relation to the view taken by the jury; the refusal to permit this defendant to be present; the denial of his written motion, and the order and direction to take a view in this defendant's absence, because this was in violation of the constitutional right of this defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of defendants in capital cases to be present at all stages of the trial and to face his accusers, and to be present when testimony is offered against him.

(Exception number 9. Transcript, pages 35-39. See also written motion in record. See also reference in charge to view, page 966.)

6. This defendant assigns as error, the refusal to permit the medical examiner to explain his testimony in regard to the location, direction, and course of the bullet wound by reference to a similar location on some other person, because the medical examiner testified he did not keep measurements of the deceased and the testimony excluded as required by necessity of the case and would tend to corroborate this defendant that he did not fire the shot which killed the deceased.

[fol. 17] (Exceptions numbers 12 and 13. Transcript, pages 162-170).

7. This defendant assigns as error, the admission of testimony of the medical examiner, upon objection, that what he saw was consistent with that bullet going through the body of the man.

(Exceptions numbers 14 and 15. Transcript, pages 180-182.)

8. This defendant assigns as error, the admission of testimony of Mrs. McPherson, over his objection, that he, Snyder, the defendant Donnellan, and one Consalvi (who was not indicted) were seen together on March 23, 1931, in Boston, because evidence was not indicative of any act on part of this defendant tending to prove the guilt of the charge in this indictment, and operated to his prejudice.

(Exception number 25. Transcript, page 247.)

9. This defendant assigns as error, the admission of the testimony, over his objection, of the result of a certain experiment made by witness Van Amburgh, on the ground that the fact testified to was not sufficiently established and connected as to constitute evidence tending to prove the guilt of this defendant of the charge in the indictment.

(Exceptions numbers 29, 30, 31, 32, 33, 34A, 35 and 35A. Transcript, pages 277-299.)

10. This defendant assigns as error, the admission, over his objection, of the evidence of Gertrude Rogers, that she had seen guns in a room, in which the defendant merely happened to be present some days before the finding of said guns, because it was undisputed that the defendant had left

Boston several days before the finding of these guns, and could not be bound by what took place thereafter.

(Exceptions numbers 40, 41, 42 and 43. Transcript, pages 332-336.)

11. This defendant assigns as error, the ruling of the Court admitting, over his objection, statements made by [fol. 18] the defendant Donnellan to Police Captain Damery not in the presence of this defendant, which tended to implicate this defendant in the murder, and as evidence against him, because narrative statements made by Donnellan under those circumstances could not bind this defendant who was not present and participated therein.

(Exceptions numbers 40, 41, 42 and 43. Transcript, pages 332-338.)

12. This defendant assigns as error, the ruling of the Court admittting, over his objection, confessions and admissions of the defendant Donnellan, in which there are statements of Snyder's conduct, on the ground that such statements of Donnellan could not bind Snyder who was not present at the time when the confession of Donnellan was made and because the reading of such statements of Snyder's conduct to the jury would be bound to prejudice him, even though the Court did say to the jury that Donnellan could not bind Snyder.

(Exceptions 46 and 47. Transcript, pages 385-388.)

13. This defendant assigns as error the admission, over his objection, of a statement by Donnellan to the police, in the absence of Snyder, that the gun that Donnellan saw at the police station was the one that Garrick handed to Snyder before the murder, the said gun being the one that the Commonwealth claimed and offered evidence tending to prove killed Kiley.

(Exception 55. Transcript, page 405.)

14. This defendant assigns as error, the ruling of the Court admitting, over his objection, statements of Donnellan not made in the presence of this defendant, referring to a gun as the one that Snyder had, that it was the gun that did the killing; that the gun "come up with that bunch at the West End there"; that a certain cap was the cap that Snyder wore; and that he (Donnellan) saw Snyder clean the gun by putting oil into it, and the purpose for

cleaning the gun, and other testimony of what Snyder did just before the robbery and at the filling station.

(Exceptions 56, 57 and 58. Transcript, pages 405-411.)

[fol. 19] 15. This defendant assigns as error, the ruling of the Court denying the motion of the defendant Snyder for the services of a medical expert, which motion is on file.

(Exception 59. Transcript, pages 425-431.)

16. This defendant assigns as error, the ruling of the Court excluding an inquiry, in the cross-examination of the Witness Garrick, that he knew that if he ever came up before another jury he could change his story.

(Exception 61. Transcript, page 456.)

17. This defendant assigns as error, the refusal of the Court to permit the cross-examination of the witness Garrick as bearing on his credibility that he was trying to get his counsel to get this case on for trial before Snyder and Donnellan returned.

(Exceptions 62 and 63. Transcript, pages 472, 473.)

18. This defendant assigns as error, the refusal of the Court to admit evidence of witness, James A. Downes, on the ground that the Commonweath's witness, McNulty, picked him (Downes) as one of the two men that were running from the station, on the ground that this testimony, if admitted, would tend to affect the credit to be given to the testimony of McNulty.

(Exceptions 64 and 65. Transcript, pages 567, 568.)

19. This defendant assigns as error, the refusal of the Court to admit a photograph of the defendant's father who died insane in Danvers, and the uncle of the defendant, who is now an inmate of an institution as an insane patient, because there was a similarity in likeness between both and the defendant himself, and would have some weight upon the mind of the ordinary person, to prove that insanity was an inheritable trait of the defendant. It is agreed that the photograph will be shown to and used in the argument before the Supreme Judicial Court.

(Exceptions 66 and 67. Transcript, pages 596-600.)

20. This defendant assigns as error, the exclusion of testimony of what this defendant's mother said at the time [fol. 20] of the occurrence of an epileptic seizure of the defendant, on the ground that what the mother said was part of the res gestæ.

(Exception 69. Transcript, pages 611, 612.)

21. This defendant assigns as error, the refusal of the Court to admit testimony describing the acts of the defendant's insane father at Danvers, as being evidence of the form of insanity from which the father was suffering.

(Exceptions 70 and 71. Transcript, page 613.)

22. The defendant assigns as error, the exclusion of the testimony of Dr. Fairbanks in describing what opportunity he had to make a study of the defendant, as a basis of giving an opinion on the ground that such testimony is material to explain the doctor's final opinion as given to the jury.

(Exception 71A. Transcript, page 648.)

23. This defendant assigns as error, the admission of testimony, over his objection, through the witness, Van Amburgh, as to an approximate direction of the bullet, and the position and conduct of the deceased at the time of the shooting, on the ground that such testimony was within the knowledge of the ordinary person who was as qualified as the witness to give his opinion on the subject.

(Exceptions 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85. Transcript, pages 705-713.)

24. This defendant assigns as error, the denial of the motion filed by him—first, that the jury be directed to find a verdict of not guilty—and second, that a verdict of murder in the first degree cannot be found against Snyder.

(Exception 89. Transcript, page 870.)

25. This defendant assigns as error, the refusal of the Court to give his requests for rulings as follows: Requests Nos. 7, 11, 12, 13, 14, 15, 16, 17, 21, 27, 33, 34, 35, 37, 38, 38A, 38B, 40, 41, 47 and 48 to 52 inclusive.)

(See Transcript, pages 863-868 and 870-874.)

[fol. 21] The defendant objected to the instruction given as to the weight to be given to the testimony of accomplices.

It is agreed that the requests as presented to the Court

will be part of the record and transcript to avoid the necessity of repeating the same here.

26. This defendant assigns as error, that part of the charge in which the Court said that "a killing in self-defense in the case of robbery was first degree and not second degree"; the statement that "one must be absolutely without mental capacity"; the statement of the Court of what a defendant charged with being a party to a common enterprise must do before he can be relieved of responsibility.

(Exceptions 91 and 92. Transcript, pages 1009-1012.)

27. This defendant assigns as error, the refusal of the Court to grant the motion and request of this defendant, at the time of verdict, that each juryman should be polled as to whether the verdict of guilty of murder in the first degree was his verdict.

(Exceptions 93 and 94. Transcript, pages 1017 and 1018.)

By His Attorney, A. C. Webber.

On the fourteenth day of October, 1932, to which time the filing thereof had been extended by the Court, the defendant Snyder filed an Additional Assignment of Errors, and the defendant Donnellon filed his Assignment of Errors, both of which are as follows:

IN SUPERIOR COURT OF MIDDLESEX COUNTY

ADDITIONAL ASSIGNMENTS OF ERROR OF DEFENDANT HERMAN SNYDER

Now comes this defendant and within the time allowed by the extension granted by the Court, files the following additional assignments of error:

23A. This defendant assigns as error the admission of [fol. 22] testimony, over his objection, of the result of a certain experiment made by witness Van Amburgh, on the ground that the experiment as to the effect of powder marks indicating the distance at which the pistol was held from the point of entrance could not be determined by experiment, unless a similar material to that worn by the

decedent Kiley at the time of his death was used in the experiment.

(Exception 86. Transcript, pages 714, 715.)

25A. By including within the parentheses to Assignment #25, the following: "See exception 88, page 867; exception 93, page 1026; exception 94, page 1027; and see also pages 1020 to 1033."

Requests #48, 49, 51 and 52 are as follows:

"Request #48. It is generally unsafe to convict upon the uncorroborated testimony of an accomplice."

"Request #49. The fact that the testimony of Garrick and Donnellan tends to connect them with the commission of the offense, are matters proper for your consideration in determining the weight to which their testimony is entitled."

"Request #51. The source of this kind of evidence is so corrupt, that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation."

"Request #52. The testimony of an accomplice should be scrutinized with extreme caution, and it is not safe or prudent to convict upon evidence of accomplice alone, unless corroborated, in important, material and vital issues."

Request #27 referred to in Assignment #25 is as follows:

"The jury are alone qualified to pass upon the question of mental capacity of the defendant. 'It is not a question of medical science, nor of legal definition, although both may materially assist you. It is a question for your common and practical sense.' "

25B. The defendant further assigns as error the refusal of the Court to give request #44 as follows:

[fol. 23] "If the defendants intended to enter the building when no one was there and steal from the building and to abandon the enterprise if intercepted or anyone should come into the building, and that the guns were to be used only to frighten off and not injure pursuers, then the defendant Snyder cannot be found guilty of murder in the first degree."

By His Attorney, A. C. Webber.

In Superior Court of Middlesex County

Assignment of Errors of the Defendant Donnellan

Now comes this defendant and files the following assignment of errors. Reference is made to the exceptions as numbered in the Transcript of the Evidence, and to the pages therein for the convenience of the Court, but such references are not to exclude other parts of the Transcript, nor are the grounds stated to exclude other grounds that are suggested by the claim, and required to fairly raise all questions of law.

1. This defendant assigns as error, the order and ruling requiring the trial to proceed without the defendant, Garrick, who was jointly indicted with this defendant, because it violated a positive right of this defendant to be tried as the grand jury directed by their indictment, and tended to convey to the jury the belief that the Government regarded Garrick less culpable than this defendant, to his prejudice.
(Exceptions 1 and 2. Transcript, pages 4-12.)

2. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Claude E. Furze, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.
(Exceptions 3 and 4. Transcript, pages 17–20.)

[fol. 24] 3. This defendant assigns as error, the refusal of the Court to permit examination of venireman, Edward B. Geldert, concerning an opinion formed by him through reading the papers to enable this defendant to bring to the attention of the Court grounds for a challenge for cause and also to guide the defendant as to the necessity of a peremptory charge.
(Exceptions 5, 6 and 7. Transcript, pages 21–25.)

4. This defendant assigns as error, the ruling of the Court admitting testimony of the witness, Captain Damery, against objection, to admissions made by the defendant Donnellan on board train leaving Los Angeles.
(Exception 16. Transcript, pages 220–223.)

5. This defendant assigns as error, the refusal of the Court to permit the witness, Captain Damery; to testify to what he (Damery) told this defendant that the defendant. Snyder said.

(Exception 17. Transcript, page 225.)

6. This defendant assigns as error, the ruling of the Court admitting testimony of Mary MacPherson as to the hiring of a room by this defendant.

(Exception 21. Transcript, page 233.)

7. This defendant assigns as error the ruling of the Court admitting in evidence the testimony of the witness, Mary McPherson, of the finding of a gun under a pillow of a bed in a room when this defendant was not present.

(Exceptions 22, 23, 24, 25 and 26. Transcript, pages 241–243.)

8. This defendant assigns as error, the ruling of the Court admitting the testimony of Officer Coleman as to who was in a certain room and what was found in that room when this defendant was not present.

(Exceptions 27 and 28. Transcript, pages 251, 252. See also cross-examination page 257 et seq.)

9. This defendant assigns as error, the ruling of the defendant admitting testimony of the witness, Captain Van [fol. 25] Amburgh, because no sufficient connection was established between the gun and bullet with this defendant.

(Exceptions 32, 33, 34, Transcript, pages 279-280. Also Exceptions 36 and 37, 38 and 39. Transcript, page 324.)

10. This defendant assigns as error, the ruling of the Court excluding part of the confession of this defendant made in the district attorney's office and taken down in shorthand by a stenographer.

(Exceptions 44, 45. Transcript, page 385. See also exceptions 48, 49, 50, 51, 52, 53 and 54. Transcript, pages 392–401.)

By His Attorney, William H. McDonnell.

And the said indictment as to James T. Garrick stands continued.

The foregoing is a true copy of the Summary of the Record and of the Assignments of Errors.

Attest:

——, Clerk.

[fol. 26] And said case was continued for the determination of the Supreme Judicial Court for the Commonwealth.

RESCRIPT OF SUPREME JUDICIAL COURT

On the first day of April, A. D. 1933, a rescript from said Supreme Judicial Court was filed in the case in words following, to wit: "Judgment on the verdict."

IN SUPERIOR COURT OF MIDDLESEX COUNTY

JUDGMENT

And now, on this eighteenth day of April, A. D. 1933, the said defendants Herman Snyder and John A. Donnellon, each being under the custody of the Sheriff of said County, again come before the Court, in his own proper person, and thereupon Frank G. Volpe, Assistant District Attorney for the Northern District of said Commonwealth, moves that the sentence provided by law be passed upon them, the said Herman Snyder and John A. Donnellon, upon which it is demanded of the said Snyder and Donnellon if they have or know aught to say why the Justice here present ought not, upon the premises and the plea and the conviction of the said Snyder and said Donnellon to proceed to pass sentence upon them, who nothing further hath to say except as before they hath said.

Whereupon, all and singular the premises being seen and understood by the Justice here, it is considered and ordered by the Court that said Herman Snyder suffer the punishment of death by the passage of a current of electricity through his body within the week beginning on Sunday, the eleventh day of June in the year of our Lord one thousand nine hundred and thirty-three.

And it is also considered and ordered by the Court that said John A. Donnellon suffer the punishment of death by

the passage of a current of electricity through his body within the week beginning on Sunday, the eleventh day of June in the year of our Lord one thousand nine hundred [fol. 27] and thirty-three.

Warrant for execution issued vs. Snyder.

Warrant for execution issued vs. Donnellon.

(1933, April 18, Certified copies of whole record of conviction and sentence delivered to the Governor. Warrants for execution delivered to the Sheriff. Certified copies of warrants transmitted to the Warden of State Prison.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 27½] [Endorsed:] Commonwealth of Massachusetts vs. Herman Snyder and John A. Donnellon. Certified copy of record.

[fol. 28] In Supreme Judicial Court of Massachusetts

Commonwealth

vs.

Herman Snyder & Another

Middlesex. Argued December 5, 1932

Present: Rugg, C. J.; Crosby, Pierce, Field, & Lummus, JJ.

Homicide, Common enterprise. Practice, Criminal, Separate or joint trial; Questioning of venireman; Bill of particulars; View; Exceptions: waiver. Jury and Jurors. Evidence, Competency, Illustration, Relevancy, Statement by coconspirator.

Assignment of errors, alleged by the defendants to have been committed at the trial in the Superior Court before T. J. Hammond, J., of an indictment charging murder.

Opinion—Filed April 7, 1933

Pierce, J.:

This case comes before this court on appeal on assignments of error. The defendants, with one James T. Gar-

rick, were indicted for murder in the first degree of one James M. Kiley at Somerville on April 9, 1931. The defendants Herman Snyder and John A. Donnellon were put on trial and found guilty of murder in the first degree. Both defendants claimed an appeal and assigned as errors the judge's ruling to proceed with the trial without Garrick; the judge's denial to allow the defendants to interrogate certain persons called as jurymen; and numerous exceptions taken during the trial to the admission and exclusion of evidence. The defendant Snyder also excepted (1) to the judge's denial of his motion to accompany the jurymen to a view; (2) to a denial of his motion for a directed verdict; (3) to the refusal to give the jury certain [fol. 29] requests; and (4) to the denial of his motion that the jury be polled after the verdict.

The evidence is voluminous but the salient facts may be briefly summarized as follows: On April 9, 1931, at about 7:45 p. m., one James M. Kiley was shot and killed while employed as an attendant in the gasoline station operated by the Cities Service Refining Company on Somerville Avenue in Somerville. A government witness, William M. McNulty, testified that he was across the street from the gasoline station and heard a shot and then saw two young men rush out of the gasoline station and get into a moving automobile which disappeared in the traffic. He ran over to the gasoline station, saw the deceased on the floor, still conscious, but unable to talk, and in his right hand, between the second and third fingers, was a burning cigarette.

Kiley was removed to a hospital and was pronounced dead when he arrived. The bullet went through his heart and out through his back, striking a pane of glass located on the east side of the gasoline station. The police found the bullet back of an oil tank standing beside the rear door; the shell was found on a rack of oil containers at the right of the entrance of the station.

On April 29, 1931, the Boston police raided a second floor room in a rooming house conducted by a Mrs. McPherson at 665 Massachusetts Avenue, Boston. In this room they found three revolvers, one of which was a thirty-two automatic, which the jury would be warranted in finding killed the deceased. Donnellon had left the room just previous

to the raid. In the room were four men, one of whom was Garrick. He, Donnellon, and two other men, and a girl, Gertrude Rogers, who was a friend of Donnellon and occupied a room on the fourth floor, were arrested. Snyder had left Boston at this time. Donnellon was later released, but Garrick was held.

On April 4, 1932, Snyder was apprehended in Philadelphia where he had assumed the name of Peter Manuel. After his arrest he admitted his identity and signed a statement that on April 9, 1931, he and Donaldson (Donnellon) went into the gasoline station in Somerville to hold up [fol. 30] the man and rob him; that he did not fire the shot that hit the man; that he heard a shot and ran and got into the automobile which Garrick had stolen and was driving. Snyder was brought back to Somerville, and in the presence of a stonographer amplified his original statement.

On April 14, 1932, the defendant Donnellon was apprehended in California. He was brought back to Massachusetts. En route he made a statement to the chief of police of Somerville admitting his part in the affair and implicating Snyder and Garrick. Upon his return, in the presence of a stenographer, he admitted that he, together with Snyder and Garrick, on April 9, 1931, started out with the purpose of holding up someone; that they stole an automobile on St. Botolph Street, Boston; that Snyder drove it and just before they got to the gasoline station in Somerville where the deceased worked Garrick took the wheel; that one of them said, "That looks like a pretty good place," and they decided to go in; that it was understood that Donnellon and Snyder were to go in the station and Garrick was to remain at the wheel; that they all three had loaded revolvers; that on the way to Somerville the defendant Snyder changed guns with Garrick, Snyder receiving the thirty-two automatic pistol from which the bullet that killed the deceased was fired; that Donnellon went into the station first and Snyder was over to the left of him, in back; that the deceased was just hanging up the receiver of the telephone which was on the side of the wall, and Donnellon said to him, "Stay where you are"; that the deceased kept walking toward him and grabbed his necktie, and then he heard a shot and ran out of the gasoline station with Snyder; that at that time he had a thirty-two revolver and Snyder had a thirty-two automatic; that they jumped

into an automobile which Garrick was driving and went in the direction of Union Square and then to Boston, where they abandoned the automobile; that before abandoning it they rubbed from it the finger prints; that they went back to the room on Massachusetts Avenue, and the gun that did the shooting was there cleaned by Snyder with oil and, with [fol. 31] the other two guns, was hidden. Snyder testified that as he got in the car he said to Garrick, "Beat it"; and Garrick testified that Snyder said: "I have shot the man."

The statements of Snyder and Donnellon made before the trial do not agree on the possession of the thirty-two automatic and as to just what occurred at the gasoline station. Snyder's statement in substance was that he had a revolver, that he thought Donnellon had an automatic; that Donnellon walked into the gasoline station and he walked in after him; that when he got in there Donnellon and Kiley were not grabbing each other but something like that; that he closed the door, heard the noise of a shot, and ran out; and that Donnellon came out after him. On the witness stand Snyder testified that he was half way in the station, saw Donnellon and Kiley fighting, sparring like, and that he said, "Beat it" and ran out; that he heard a shot when he was just stepping in the automobile, and that after he got in Donnellon got in. Donnellon's testimony on the stand was in substantial agreement with his previous statement, except that on the stand he testified that he had just got outside the door when he heard the shot. On the witness stand Garrick testified in substance in accord with the testimony of Donnellon. He testified that Snyder and Donnellon told him that they were going out to hold up a store or somebody and that he decided to go with them; that he had the big automatic (which was in evidence exhibit 26), gave Donnellon the hammerless and Snyder had the twenty-five automatic; that Snyder asked for the big automatic and he swapped with him and took the twenty-five automatic. He testified that he drove right opposite the door of the gasoline station and Snyder and Donnellon went in; that after the shot both ran out of the gasoline station; that when Snyder got in the car he said, "For Christ's sake get out of here" "I have shot the man" and that after they returned to Boston they poured oil through the one gun, wiped off the three guns, and put them away.

Evidence was given by a ballistic expert to the effect that he had made experiments with the shell and bullet found in [fol. 32] the gasoline station with a thirty-two automatic pistol, identified as the one which Snyder had (if the testimony of Donnellon and Garrick is believed) at the time of the shooting, and expressed the opinion that the bullet that killed Kiley was fired from that particular gun. It was admitted at the trial that James M. Kiley, the individual named in the indictment, died on the night of April 9, 1931, as a result of a gunshot or pistol wound.

Certain specifications were filed at the request of Snyder. In these specifications it is contended by the Commonwealth that Snyder did the actual shooting. The request of Snyder and the answer of the Commonwealth were read to the jury against the objection of the defendant Snyder.

We now consider the assignments of the defendant Snyder.

1. The first assignment of error is based on exceptions one and two and relates to the allowance of the motion by the Commonewalth that the trial proceed against Snyder and Donnellon and not against Garrick. The question of separate or joint trials rests in sound judicial discretion, Commonwealth v. Gallo, 275 Mass. 320, 326, Commonwealth v. Borasky, 214 Mass. 313, Commonwealth v. Sacco, 255 Mass. 369, 413, which was not abused on the reported evidence in this case. The contention that the exercise of judicial discretion required a hearing upon facts presented to the judge in support of the request of the district attorney is not supported by the decisions. The judge appears to have acted in the exercise of his discretion and the question is not presented whether (as has been said) it is optional with the prosecuting attorney to try the defendants jointly or separately unless the judge grants a severance on the motion of one or more of the defendants. United States v. Wilson, 28 Fed. Cases, No. 16,730. People v. Clark, 102 N. Y. 735. Reg. v. Richards, 1 Cox C. C. 62. See State v. Francis, 152 S. C. 17, and, on the issue raised by the defendant, note to that case and collection of cases in 70 A L. R. 1171, 1178, 1179.

2. The second and third assignments of error consist of exceptions three, four, five, six and seven. They may be [fol. 33] considered together, and are so considered in the

brief of the defendant and of the Commonwealth. They relate to the refusal of the judge to permit examination of the veniremen Claude E. Furze and Edward B. Geldert concerning opinions formed by each of them, through reading the papers, to enable the defendant to bring to the attention of the judge grounds for challenge for cause and also to guide the defendant as to the necessity of a peremptory challenge. In each instance the veniremen Furze or Geldert stated that the opinion formed by him from reading the papers would not preclude him from following the evidence and rendering a verdict on the testimony given under oath. The judge ruled that each of them stood indifferent. Thereupon the venireman Furze was challenged by Donnellon and the venireman Geldert was challenged by Snyder. The defendant concedes that G. L. (Ter. Ed.) c. 234, § 28, was not intended to give a party defendant the right to submit a venireman to cross-examination in order to elicit facts tending to show bias or prejudice on the part of a juror, but contends that, within the rule stated in Commonwealth v. Cero, 264 Mass. 264, at page 271, something appeared which made it proper to go beyond the usual course of procedure, in that the veniremen openly indicated the forming of opinions. There is nothing in this contention. Furze responded in the affirmative to the question put by the judge: "You believe you could follow the evidence and render your verdict without being swayed by what you had read?" Geldert likewise responded in the affirmative to the question put by the judge: "That is, you would be able to follow the evidence and disregard anything you had read in the papers?" In these circumstances there was no occasion for the judge to go further than to follow the established rule. Commonwealth v. Webster, 5 Cush. 295. Holt v. United States, 218 U. S. 245, 248. The ruling was free from legal error.

3. The fourth assignment of error is based on exception eight, and assigns as error the ruling and direction requiring the clerk to read the Commonwealth's specifications to the jury after objection made to this procedure by this defendant (Snyder) because the office of said specifications [fol. 34] was merely to inform the defendant of certain facts to enable him to present his defence, and the reading of the specifications tended to prejudice this defendant be-

fore the jury. It is obvious this procedure was warranted, as the Commonwealth contends it was, by the language used in Commonwealth v. Howard, 205 Mass. 128, 145, Commonwealth v. Peakes, 231 Mass. 449, 456, and in Commonwealth v. Gedzium, 259 Mass. 453, 457. The governing statute, G. L. (Ter. Ed.) c. 277, § 40, authorizes the judge to have the specifications read to the jury. The reason for allowing a defendant to obtain a bill of particulars is to inform him fully of the nature of the offence "where the indictment alone does not sufficiently inform the defendants, and this as matter of right." Commonwealth v. Farmer, 218 Mass. 507, 509. Commonwealth v. Belenski, 276 Mass. 35, 40. The specifications affect the proof, mode of trial and the indictment, and are a part of the record. Commonwealth v. Gedzium, 259 Mass. 453, 457, 458, and cases cited. Indeed the defendant was not prejudiced by the procedure followed, for the district attorney rightfully could and did present the same facts to the jury in his opening.

4. The fifth assignment of error rests on exception nine and relates to all proceedings that occurred in relation to the view taken by the jury, the refusal to permit Snyder to be present, the denial of his written motion "to attend view" and the order and direction to take a view in this defendant's absence, and alleges that this refusal was in violation of the constitutional rights of the defendant under the Constitution of the United States and the Constitution of Massachusetts which guarantee the right of a defendant in capital cases to be present at all stages of the trial and face his accusers and to be present when testimony is offered against him. The decisions on the question relating to view in criminal cases are in conflict in other States. The cases recognizing the right of the accused to be present when such view is had do so chiefly on the ground that either it is a part of the trial, or, since the jury have the right to treat the information received during the view as [fol. 35] evidence, the accused, under the Constitution, has a right to be confronted by the witnesses and therefore must be present. See note to Noell v. Commonwealth (135 Va. 600), 30 A. L. R. 1345, 1357, where the cases are reviewed; see also note to People v. Thorn (156 N. Y. 286), 42 L. R. A. 368. At common law, except upon an indictment for criminal nuisances, a view was not allowed in criminal

cases "without mutual consent." Commonwealth v. Handren, 261 Mass. 294, 297. In this Commonwealth the judge by Rev. Sts. c. 137 § 10, now G. L. (Ter. Ed.) c. 234, § 35, was given authority to "order a view by any jury empanelled to try a criminal case." It is now settled that a view is not such a taking of evidence as violates the constitutional right of the defendant "to meet the witnesses against him face to face." Commonwealth v. Dascalakis, 246 Mass. 12, 31. 3 Wigmore on Evidence (2d ed.) § 1803. It is expressly decided in Commonwealth v. Dascalakis, 246 Mass. 12, 31, that the defendant in a capital or other criminal case could waive whatever rights he had to accompany a jury on the view, and it was said that "There are obvious practical objections to the contention that as matter of right a defendant in a criminal case may accompany the jury on a view. The whole subject rests in the sound discretion of the court." It was decided in Commonwealth v. Belenski, 276 Mass. 35, that the refusal in that case to permit the defendant to accompany the jury on a view was within the sound discretion of the trial judge, citing Commonwealth v. Dascalakis, 246 Mass. 12, 28–31. The defendant Snyder in support of his motion to be present at the view argued the broad ground of legal right to be present at all times during the course of the trial and thereby to acquaint his counsel with the facts thus secured which might be necessary to aid in his defence. The attorney for the defendant Donnellon in support of the motion said: "In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things." The judge said: "I am not sure but that can be arranged." [fol. 36] Counsel for Donnellon then said: "I do not care whether it is done in the presence of the jury." The judge then decided it would not be for the best interest of any one to have the prisoners go with the jury but stated: "On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning." After the view the request was not renewed. There is nothing in the record which dis-

closes that the defendants were deprived of effective aid in the preparation and defence of their case that would have been afforded by their presence at the view. We see no error in the trial judge's refusal to grant the motion. The defendant's contention that the refusal to grant the motion is a violation of art. 14 of the Amendments to Constitution of the United States in that it is a denial of "effective aid in the preparation and trial of a capital case," and therefore is a denial of due process of law, citing Powell v. Alabama, 287 U. S. 45, 52, 57, 58, is unsound, in that the chief purpose of a view is to enable the jury to understand better the testimony which has been or may be introduced, and because the view is not a part of the trial, it being suspended while the view is taken. Commonwealth v. Dascalakis, 246 Mass. 12, 29–30. See Commonwealth v. Slavski, 245 Mass. 405, 413.

5. The sixth assignment of error rests on exceptions twelve and thirteen and relates to the refusal of the judge to permit the medical examiner to illustrate before the jury "the location, direction, and course of the bullet wound" by referring "to a similar location on some other person." In his discretion the judge could have granted this request. State v Hoagland, 39 Idaho, 405, 422. The defendant was permitted to and did examine the medical examiner in great detail in reference to the body of the deceased. There is no error shown by the refusal.

[fol. 37] 6. The eighth assignment of error is based on exception twenty-five, and relates to the admission of testimony of the landlady of the rooming house in which the "fatal" gun was found by the Boston police, to the effect that she saw Snyder and Donnellon together at her rooming house some two weeks before the murder. The defendant Snyder rests his objection on the contention that the evidence was not indicative of any act on his part tending to prove the guilt of the charge in the indictment. The evidence was clearly admissible to show the relations existing between the two men, and Snyder in his testimony admitted his presence in this particular house both before and after the murder.

7. The tenth assignment of error rests on exceptions forty, forty-one, forty-two and forty-three. It relates to the testimony of one Gertrude Rogers that she saw guns in the room at 665 Massachusetts Avenue in the early part of

the evening of April 29, 1931. The defendant Snyder objects to this evidence as binding upon him "because it was undisputed that the defendant had left Boston several days before the finding of these guns, and [he] could not be bound by what took place thereafter." The finding of objects in the house of another without a showing that the defendant was connected in any way either with the house or with such other person is inadmissible; McBride v. Commonwealth, 95 Va. 818; but the connection was here shown. The Commonwealth introduced evidence to show that one of the guns found in this room, when the police raided it a few hours after Gertrude Rogers had seen the guns there, was the "fatal" gun, and this gun was traced into the hands of Snyder on the night of the murder. Snyder testified that he was with Donnellon in Gertrude Rogers's room on the floor above at about 12:30 in the morning following the night of the murder. The evidence tended to prove that Donnellon hired and occupied the room where Gertrude Rogers saw the guns and that he had stepped out of the room just before the raid by the police. There was no error in the admission of this testimony. Moreover, the judge speaking of exception forty-three said to counsel for the [fol. 38] defendant: "I don't understand that anything is in up to this point, but if there is anything that counsel desire now to offer, it may go in." This was not followed by any offer of proof. These exceptions could therefore properly be treated as waived.

8. Assignments of error eleven to fourteen are considered together in the defendant's brief and we so treat them. The eleventh assignment relates to the ruling of the judge admitting statements of Donnellon made a year after the shooting to the chief of police of Somerville, not in the presence of Snyder, which tended to implicate Snyder in the murder; the twelfth, thirteenth and fourteenth assignments of error rest on exceptions forty-six, forty-seven, fifty-five, fifty-six, fifty-seven and fifty-eight, and relate to the ruling of the judge admitting part of the statements made by Donnellon to the district attorney in the presence of a stenographer, in which there were statements implicating Snyder in the murder. It is settled that declarations, admissions, or confessions made after the conspiracy has

ended bind only the maker, and cannot be used in evidence against other members of the conspiracy not present when they are made. Commonwealth v. McDermott, 255 Mass. 575, 581. This evidence never was admitted against Snyder. The jury were instructed in every proper way not to consider this evidence against Snyder. They were told: "This [evidence] is admitted only as against Donnellon. Keep that in mind even though there be references to any acts of either of the others who it is alleged were there"; and again, at the conclusion of the reading of the statement of Donnellon, the judge said: "It is not admitted as against Snyder. It is only admitted as against Donnellon, and I again repeat that to the jury." This was all that was required of the judge. Commonwealth v. Rogers, 181 Mass. 184, 193.

9. The sixteenth and seventeenth assignments of error, based on exceptions sixty-one, sixty-two and sixty-three, are considered together. They relate to the cross-examination of Garrick, who was called by the Commonwealth, the object being to affect the credibility of Garrick by showing "that [fol. 39] he was trying to get his counsel to get this case on for trial before Snyder and Donnellon returned." The questions for this purpose excluded were (1) "And you knew that if you ever came up before another jury, you could change your story, couldn't you?" (2) "Your attorney, Mr. Daly, tried to get this case on for trial before they got Snyder and Donnellon?" (3) "You knew then that the government, or you realized or thought that the government had no evidence against you?" The defendant contends that these questions were well within the limits of reasonable cross-examination "to prove interest or bias or prejudice" and he, Snyder, had the right to have them answered as an absolute right and not within the discretion of the judge, citing Commonwealth v. Russ, 232 Mass. 58, 79, Commonwealth v. Sansone, 252 Mass. 71, 74, See Commonwealth v. Marcellino, 271 Mass. 325. There was no offer of proof and in the absence thereof it is plain the questions in themselves had no tendency to show interest, bias or prejudict. Commonwealth v. Sansone, 252 Mass. 71. The questions were rightly excluded.

10. The eighteenth assignment of error rests on exceptions sixty-four and sixty-five, and relates to the rulings of the judge wherein he refused to admit evidence of a witness,

Downes, that McNulty had picked him out as one of the two men he saw running from the gasoline station. If it be assumed that the evidence would have a tendency to contradict McNulty and was therefore admissible, Snyder suffered no material harm by its exclusion for the reason that he testified himself to running out of the gasoline station and getting into the car.

11. Assignments of error twenty to twenty-two inclusive, based on exceptions sixty-nine to seventy-one A, are considered together. They relate to the issue of insanity. One Danzinger, testifying as to the conduct of Snyder upon an occasion when the witness was visiting the Snyder family, was asked by counsel for Snyder: "What did the mother say to him on this occasion?" referring to an incident which arose during the service of a dinner to the children, and which followed the action of the mother when she went over [fol. 40] to Snyder and "says, 'Hermie, this is your plate,' and he sat down and * * *" Exception sixty-nine relates to what, if anything, the mother said. The defendant made no offer of proof, but contends that the statement of the mother, whatever it was, was a part of the res gestæ and that it would tend to illustrate and explain the conduct of Snyder which followed. It does not appear that the excluded utterance related to the circumstance of the occurrence which preceded it or that it would give a "complete picture" of an event otherwise incomplete. 3 Wigmore on Evidence (2d ed.) § 1750. "It is not the law that any and all conversation which happens to be going on at the time of an act can be proved if the act can be proved." Commonwealth v. Chance, 174 Mass. 245, 251. The same witness testifying as to a visit made on Snyder's father in Danvers was asked to "Describe what you saw in Danvers." The evidence was excluded rightly; it was too broad, and if it were applicable to the condition of the father, it would be no better. The Commonwealth had admitted the insanity of the father and the particular form or manifestation of it was not material to any issue in the case. The defendant assigns as error the exclusion of testimony of one Dr. Fairbanks "in describing what opportunity he had to make a study of the defendant, as a basis of giving an opinion on the ground that such testimony is material to explain the doctor's final opinion as given to the jury." This assignment was based on exception seventy-one A. This exception

was disallowed. However, the defendant was not harmed for the witness subsequently testified as to just what opportunity he had to make a study of the defendant.

12. The next assignment of error, twenty-three, rests on exceptions seventy-two to eighty-five inclusive and relates to the admission of the testimony of the witness Van Amburgh, an expert in firearms evidence in the department of public safety, given under cross-examination by counsel for the defendant Donnellon as to the approximate direction of the bullet and the position of the deceased at the time of the shooting. The contention of the defendant Snyder is "that such testimony was within the knowledge of the [fol. 41] ordinary person who was as qualified as the witness to give his opinion on the subject." The questions were in part based on the hypothesis of the bullet entering the body from left to right, leaving the body an inch or two below the right shoulder. The testimony pertained to a knowledge of anatomy, of the vital organs of the human body and the course of the projectile through it. It cannot be presumed the jury would not be aided by the technical knowledge of the witness. Commonwealth v. Dorr, 216 Mass. 314, 317. Commonwealth v. Festo, 251 Mass 275, 280. The testimony of the witness did not involve any expression of opinion on disputed questions of fact. Stoddard v. Winchester, 157 Mass. 567, 575. The procedure followed was in conformity with the rule laid down in Commonwealth v. Russ, 232 Mass. 58, 73-74. Whalen v. Rosnosky, 195 Mass. 545, cited by the defendant, is plainly distinguishable. There was no error in the admission of this testimony.

13. The next assignment of error, twenty-three A, rests on exception eighty-six and relates to the testimony of the same witness, Van Amburgh, as to the effect of powder marks for the purpose of determining the distance at which the pistol was held from the body of Kiley. The defendant contends that the evidence was improperly admitted "since the witness did not use the same material in his experiments as that worn by Kiley at the time of the shooting." The experiments were not made under identical conditions but were made under such similar conditions as naturally would tend to throw light on the point in controversy and to assist the jury to arrive at the truth. When Kiley was shot he wore a coarse woolen sweater; the tests were made on both

cotton and wool. It is plain the admission of the evidence was a matter of discretion which was not abused.

14. Assignments of error twenty-five, twenty-five A, twenty-five B and twenty-six relate to requests for rulings and to the charge. The eleventh and seventeenth requests were as follows: "Upon all the evidence, the defendant Snyder is not guilty of the crime of murder in the first degree." "The jury is not warranted in concluding upon the evidence that the shooting of the decedent was done with deliberately [fol. 42] premeditated malice aforethough." Counsel for the defendant Snyder states that these requests "sought to have withdrawn from the jury the submission of the issue of murder in the first degree so far as the deliberation and premeditation element was concerned." The point was also raised by motion. Assignment twenty-four based on exception eighty-nine relates to the denial of this motion. On the motion and on the requests it is sufficient to say without a review of the evidence that it is clear the jury were fully warranted in finding that the defendant Snyder with deliberately premeditated malice aforethought shot and killed James M. Kiley. Commonwealth v. Tucker, 189 Mass. 457, 486-496. Requests thirty-four, thirty-five and thirty-seven, which were refused, relate to the use of intoxicating liquor and the mental condition of Snyder. There was evidence that Snyder had been drinking before the killing of Kiley. Snyder testified that he was drunk at the time the car was stolen, and that he was unable to drive. There is no evidence as to his condition due to intoxicating liquor at the time of the commission of the crime; full and accurate instructions were given the jury by the trial judge on this branch of the case, Commonwealth v. Gleason, 262 Mass. 185, 191, Commonwealth v. Taylor, 263 Mass. 356, 362-363, as well as on the mental condition of the defendant. Commonwealth v. Rogers, 7 Met. 500. Commonwealth v. Stewart, 255 Mass. 9, 13-14. Request forty is as follows: "If the defendant Snyder, upon seeing the decedent Kiley struggling with the defendant Donnellon loudly cried out 'Beat it' or 'Run' or some other equivalent expression, and ran out of the filling station intending to withdraw from the common enterprise and thereafter shot was fired, he, Snyder, cannot be found guilty of first degree murder." The refusal of this request was proper. There "was no

basis upon which could have rested a verdict that the defendant made timely abandonment of the criminal enterprise in which he had been a conceded participant. * * * Whatever may be the other requirements of an effective abandonment of a criminal enterprise it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandon- [fol. 43] ment and the act from responsibility for which escape is sought." People v. Nichols, 230 N. Y. 221, 228-229. Here, the struggle, the alleged call to Donnellon to 'come out, and the fatal shot, were all parts of a single and brief transaction.

15. The seventh assignment of error resting on exceptions fourteen and fifteen, the ninth assignment resting on exceptions twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four A, thirty-five and thirty-five A, the fifteenth assignment resting on exception fifty-nine, the nineteenth assignment resting on exceptions sixty-six and sixty-seven, part of the twenty-fifth A assignment resting on exception eighty-eight, refusals to rule, the twenty-sixth assignment resting on exceptions ninety-one and ninety-two and the twenty-seventh assignment of error resting on exceptions ninety-three and ninety-four, have not been argued and ordinarily would be deemed to be waived. We have, however, examined each and all of the exceptions and find no reversible error. No assignments of error were made by the defendant Snyder as to exceptions fifteen B, nineteen, twenty, sixty-eight, eighty-seven and ninety. These are not open to the defendant under § 33D added to G. L. c. 278 by St. 1925, c. 279, § 1. Commonwealth v. Cero, 264 Mass. 264, 271.

The defendant Donnellon filed ten assignments of error. He filed no brief. We have considered all the exceptions on which they are based and find no reversible error.

Judgment on the verdict.

A. C. Webber (W. J. McCarthy & L. H. Weinstein with him) for the defendant Snyder.

F. G. Volpe, Assistant District Attorney, for the Commonwealth.

[fol. 44] APPENDIX 2 TO PETITION

Request for Rehearing in State Supreme Court and Order (Original)

[fol. 45] I, A. C. Webber, counsel appointed by the Court to represent Defendant Herman Snyder, do hereby certify that the following is a copy of my carbon copy of the original request for a re-hearing directed to the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts on April 3, 1933 in the case of Commonwealth v. Herman Snyder; that I made application to the office of Walter F. Frederick, the Clerk of said court, for a certified copy, and was informed that such petitions are not made part of the court record.

I further certify that the original letter dated April 7, 1933, hereto annexed, denying the application for re-argument was received by me and refers to said Petition for re-hearing; and that a copy of said petition and said letter will be served upon the Attorney General of the Commonwealth, representing the Respondent herein.

A. C. Webber, Counsel appointed by Court for Herman Snyder.

Subscribed and sworn to, before me. William J. McCarty, Notary Public. (Seal of William J. McCarty, Notary Public, Massachusetts.)

Dated at Boston, Mass., August 2, 1933.

[fol. 46] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

In re

COMMONWEALTH

v.

HERMAN SNYDER

PETITION FOR REHEARING—April 3, 1933

To the Honorable the Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts:

Respectfully represents Herman Snyder, who stands convicted of the capital crime of murder in the first degree,

that on March 31, 1933 the Supreme Judicial Court in a written opinion, overruled your petitioner's bill of exceptions heretofore duly filed, and argued before this Court on December 8, 1932.

Your petitioner sincerely believes that by accident, oversight or inadvertence, a wrong conclusion was reached in the case which should call for correction, or re-argument.

The error relied upon herein relates to the Fifth Assignment of Error covered by pages 12 to 48 inclusive in your petitioner's brief, and the claim of your petitioner is that the Supreme Judicial Court did not fully consider the following matters involved in the consideration of the matters presented by said Assignment:

1. The opinion does not consider the legal effect of the presence of the presiding justice at the view and his general conduct and control of proceedings in the presence of the jury and thereby making the view a part of the trial, which presence and conduct of the presiding justice is part of the fundamental concept of trial by jury as pointed out in the opinion in the Dascalakis case. (See pages 12-14 of Defendant's Brief.)

2. The opinion does not consider the use which was to be made of the view by the jury according to the charge. (See pages 16-17 of Brief.)

3. The opinion in reply to your petition's argument that he was denied effective aid in the preparation and trial of his case refers solely to a colloquy which took place at the trial between Donnellan's counsel and the trial court, and with which colloquy your petitioner was not concerned and the colloquy relating to your petitioner is not stated or referred to according to page 38 of the Transcript.

4. The opinion does not consider the unbroken and general practice in this Commonwealth with reference to right of a defendant in a capital case to be present at a view where the right is not waived. This practice is set out in pages 30 to 46 inclusive of your petitioner's brief, and illustrated by excerpts from twenty-three murder trials both be-
[fol. 47] fore and since the Dascalakis case, and by the claim of counsel for your petitioner that there is no recorded instance in the judicial history of this Commonwealth or in any other jurisdiction, with the exception of the single in-

stance of Commonwealth v. Belenski, 276 Mass. 35, where this right of the petitioner has been refused where seasonably insisted upon. That the question of practice is involved in the decision of the Dascalakis case upon which authority Commonwealth v. Belenski rests. (See pages 31 to 46 of Brief.)

Wherefore your petitioner prays that in the interest of justice, the opinion of the Supreme Judicial Court with reference to said Fifty Assignment of Error be corrected, or that your petitioner be permitted to re-argue the case on said Fifth Assignment of Error.

Herman Snyder, by His Attorney, A. C. Webber.

[fol. 48] COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT

ORDER DENYING REHEARING—April 7, 1933

A. C. Webber, Esq., 1113-18 Barristers' Hall, Boston, Massachusetts.

DEAR SIR: Your application for reargument in 7266, Commonwealth v. Snyder, has been considered by the full court and is denied.

Yours truly, Arthur P. Rugg, Chief Justice.

[fol. 49] Clerk's certificate as to Chief Justice, omitted in printing.

[fol. 50] SUPREME COURT OF THE UNITED STATES

STIPULATION RE APPENDIX II TO PETITION

It is hereby agreed that Appendix II to the petition in the above entitled action may be added to the Record.

A. C. Webber, Attorney for Petitioner. Joseph E. Warner, Attorney General, by Geo. B. Laurie, Assistant Attorney General, Attorney for Respondent.

[fol. 51] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of Massachusetts is granted, and the case is advanced and assigned for argument on Monday, November 6th next, after the cases heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,844. Massachusetts Superior Court in and for the County of Middlesex. Term No. 241. Herman Snyder, petitioner, vs. Commonwealth of Massachusetts. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1933. File No. 241, O. T., 1933.